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INFORMATION CONCERNING THE REPORT OF THE SPECIAL RAPPORTEUR ON THE STUDY OF THE CULTURAL AND INTELLECTUAL PROPERTY OF INDIGENOUS PEOPLES

Information received from indigenous peoples
and non-governmental organizations

Information submitted by the Movement "Tupay Katari"

PRESERVATION AND RESTITUTION OF THE INDIGENOUS CULTURAL HERITAGE

I. HISTORICAL BACKGROUND

1. Five hundred years after the so-called "meeting of two cultures", there is a greater need than ever to raise a most complex and controversial question, that of the preservation and restitution of cultural property traditionally belonging to indigenous peoples and nations throughout the world. This paper will focus on the Indo-American continent, where, contrary to the falsified version of history instilled into us by the colonizers for centuries, the major civilizations - Mayan, Aztec, Incan, Aymaran, and others, from Alaska to Tierra de Fuego - had already had 4,000 to 6,000 years of fabulous history. The traces of this history that remain, filled with wisdom and creative imagination, represent today an inestimable contribution to the cultural heritage of mankind.

2. Unfortunately, the wars of conquest and the European colonization violently disrupted the economic structures and social relationships on which age-old cultures had been built, ancestral traditions developed and spiritual and philosophical values and artistic creations conceived.

3. Historically, indigenous cultural wealth was considered to be booty from the colonial wars and regarded as a "legitimate" object for international pillaging, followed by the violation of secret rites and sacred places with complete impunity. The best part of the indigenous peoples' cultural and artistic heritage has been plundered. Most of the precious objects, written documents and even human remains of their ancestors were stolen by the colonial Powers and are today part of private and public collections in Europe and America, and frequently the subject of deals and speculation in the international antiques market.

4. The cultural property and material and spiritual treasures that left the territories of the Andean civilizations in enormous quantities "today wander, mortally wounded, through airports, customs depots and international auction houses", in the words of C. Bubba, a researcher from Hisbol, Bolivia (Presencia, 9 October 1992). Art in its historical and social dimension is Man, his image, his past and present. Having been dispossessed of the cultural property that embodied the centre of the social, political and religious life and the very backbone of the Andean tribes who were the native peoples of the Inca empire, their descendants lost their souls and their cultural identity.

5. With the passage of time, step by step the indigenous peoples have come to realize that, throughout five centuries of colonial and neo-colonial domination the creations of their cultural heritage have been a source of strength and vitality for indigenous, black and popular resistance, a formidable driving force behind the march of history. This is the basic reason why indigenous nations that have so far been able to resist the invasion of Western culture increasingly recognize in the artistic creations and expressions of the folklore transmitted from generation to generation the basis and roots of their indigenous identity.

6. Referring to the role of the State in protecting the indigenous cultural heritage, the writer E. Galeano said, "The dominant Creole class in Latin America, obsessed with Western culture, considers the beautiful indigenous costumes to be ridiculous fancy dress, good only for carnivals or museums". Far from ensuring the protection of the cultural heritage of the pre-Columbian civilizations, "the dominant classes in power are ashamed of the Indian race; they consider native languages to be mere guttural noises and the native religion to be nothing more than idolatry". The dominant culture accepts "Indians as the subject of anthropological studies, but does not recognize them as subjects of history ...". In the view of the leaders of the cultural alienation process, "Indians have folklore, not culture, practise superstition, not religion, speak dialects, not languages, create craftwork, not art." (Noticiero latinoamericano, 17 August 1991).

II. NEED FOR LEGAL PROTECTION

7. Today the cultural property of indigenous peoples, an inestimable contribution to past and present civilizations, is more than ever exposed to the attacks of time and the white man in this technological age. The integrity of artistic creations and expressions of native folklore as a living tradition is under grave threat from economic factors and interests, in particular the introduction of increasingly sophisticated technology into all areas of social and cultural life, especially in the fields of sound and audiovisual recording, broadcasting, cable television, etc. Because of this irreversible phenomenon, in highly-industrialized countries that develop along Western lines the vestiges of folklore are regarded merely as an aspect of theoretical anthropology. In other words, the indigenous heritage continues to be a victim of permanent aggression by the dominant culture and ultimately runs the risk of becoming distorted, and perhaps extinct, if States do not take steps to protect it.

8. One of the main reasons why it is urgently necessary to organize the protection of the creations, property and assets inherited from pre-Columbian civilizations is undoubtedly the close identification of indigenous communities in different parts of the world with their cultural heritage, the reflection of their past and reference point for their present. It is not enough to declare them State property, the cultural patrimony of mankind or the universal heritage without also identifying the elements of the various items in time and space and acknowledging that each people has collective ownership of its own creations, subject to customary laws. Countries that do not recognize indigenous communities and other traditional tribes as the original owners of their cultural heritage will be injuring their collective spirit and denying their deep-rooted desire to dispose of their cultural property as they wish.

9. The question of legal protection against looting and illicit utilization will not be fully resolved until the international community ends the national and international plunder of the indigenous cultural heritage that has been going on for over five centuries. From the time the conquistadores set foot on Indian soil up to the present day, the history of the indigenous nations has been marked by a thousand examples of mutilation of indigenous cultures and flagrant violations of their legitimate rights to intellectual property, causing irreparable material and moral damage.

10. Following revelations and complaints by indigenous peoples we now know that "In 1976, claims were made by certain Australian Aboriginal tribal elders that some photographs contained in a book of anthropological studies depicted subjects that have secret and sacred significance to their community and alleged that no proper permission had been given to publish them (Model Provisions for National Laws, UNESCO/WIPO, 1985). Another example is the secret filming of the traditional ceremonies of the North American Hopi Indians, in violation of their spiritual beliefs, by foreign ethnologists for commercial purposes (E/CN.4/Sub.2/1991/34).

11. In addition to this harmful trade in cultural and spiritual objects, there are an infinite variety of medicinal plants discovered by indigenous peoples that are now being exploited by the major transnational corporations

with neither the authorization nor the consent of their true owners. Trade in the pharmaceutical products produced from the industrialization of this unprotected biological heritage brings the multinational corporations annual profits of $43 billion, while the Indians are dying of disease for lack of medicine and medical care.

12. Apart from the commercial value, the totally unpunished looting and unlawful traffic in cultural and artistic property of which the original owners have been dispossessed means for indigenous nations a loss of their cultural and spiritual heritage. How sad it is to note that many indigenous communities are left without samples of their culture to teach their children and grandchildren the history of their people (E/CN.4/Sub.2/1991/34).

13. The fanatical destruction of ancient manuscripts in Mexico is a good illustration. The manuscripts were used to record historical and genealogical facts about the rulers, together with events in their reigns, astronomical observations such as eclipses and cycles of the planet Venus, religious tales and rituals, etc.

14. In this connection J.L. Martinez, Director of the Mexican Academy, tells us that, "Once the conversion of the natives was under way and the priests became concerned with combating what they considered to be surviving aspects of idolatry, any books they came across were burned as being the objects of witchcraft and demons. We have knowledge of two major destructions, that of the Tezcoco archives and the auto-da-fé at Mani, in Yucatán".

15. "The first Bishop of Mexico took it into his head that all the Indians' symbolic manuscripts were objects of magic, witchcraft and demonism and decided it was his religious duty to get rid of them, both personally and through the missionaries, and thus the Aztecs' entire libraries were thrown to the flames ..." (see F.S. Teresa de Mier: Apologia (1817), 2 vols. vol. 1). Historians of the era tell us that, "in addition to illustrated books, thousands of idols, vases and stone sculptures and 27 deerskin scrolls containing signs and hieroglyphics were destroyed".

16. Yet even back then there was resistance: "The Indians wrote out their manuscripts again or hid them to preserve the history of their nation" (see Fray Servando, Apologia, ibid). The original manuscripts of ancient Mexico are documentary evidence of the highly advanced cultures of the Aztecs, Mayas, etc., "whose descendants today shed bitter tears at having been left, as it were, in the dark, with no knowledge of the events of their past" (cited by J.L. Martinez, Director of the Mexican Academy).

17. In view of the foregoing, there is an urgent need to draw up appropriate legal instruments for the effective preservation and protection of the ancestral intellectual creations of indigenous communities and nations throughout the world, including American Indians. After 500 years of injustice, States and the entire international community have a responsibility to ensure the protection of the whole of the indigenous cultural heritage at both the national and international levels.

III. LEGAL SCOPE

18. In the field of protection and preservation of the cultural property of indigenous peoples, in particular the creations of folklore, crafts, human remains, etc., national legislation and international instruments have developed in complete disregard for these age-old lifestyles and traditions and the philosophies and customary laws that governed their social relationships. The industrialized countries and their local spokesmen in countries with indigenous populations have not established provisions that meet the just aspirations of indigenous peoples and give them full power to dispose of their cultural and intellectual heritage.

19. The first attempts to regulate the protection and utilization of native folklore were made in the framework of various copyright laws in developing countries, such as Kenya (1975), Tunisia (1967), Chile (1970) and Bolivia (Decree of 1978) (see Model Provisions, UNESCO/WIPO, 1985). Among examples of national legislation, mention should be made of the Copyright Act adopted by Bolivia in 1992. The Act considers works of folklore to be "all literary and artistic works produced in the national territory by unknown or unidentified authors presumed to be nationals of the country or its ethnic communities and transmitted from generation to generation, representing one of the basic elements of the nation's traditional cultural heritage. All of these legal provisions define indigenous peoples' cultural property, including the creations of their folklore, as part of the nation's traditional cultural heritage in some countries and as national cultural property in others, without identifying the protagonists of indigenous culture.

20. Concerning the oldest international instruments dealing - although very restrictedly - with the question that concerns us, mention should be made of the Berne Convention for the Protection of Literary and Artistic Works, signed over a hundred years ago. Article 15, paragraph 4, of the Convention defines works of folklore as "... unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union", and says that "it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union". These provisions basically refer to works of "folklore" whose origins have been lost over time, so that the identity of their authors is unknown, but it is presumed that they were natives inspired by spirit of popular invention.

21. For as long as the Berne Convention has been in force, the provisions adopted to date in the area of copyright have been found to be neither sufficient nor effective in ensuring the ownership, control, preservation or restitution of cultural property, in particular expressions of folklore that take their source from indigenous civilizations, whether in the Andes or in the immense territories of Siberia. Because of its nature and scope, copyright has not proved to be an appropriate means of protecting the traditional creations of folklore and setting forth rules for using it in conformity with the interests of its authentic authors.

22. In the opinion of experts on intellectual property in the protection of folklore, "the traditional creations of indigenous peoples, such as folk tales and legends, songs, music, musical instruments, dances, designs or patterns, are the product of a slow process of creative development, and, as maintained by a particular community, are much older than the duration of the copyright protection granted by States with regard to authors' works" (UNESCO/WIPO/WG.1/FOLK/2/Add.).

23. One of the more recent instruments is the 1970 Convention adopted by the General Conference of UNESCO. Although its provisions are aimed at preventing and curbing the unlawful exportation, importation and removal of cultural property, they are essentially limited to regulating the illegal acquisition of and trafficking in cultural property (E/CN.4/Sub.2/1991/34).

24. On the other hand, the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, signed in 1972, gives us more material. Article 1 considers the cultural heritage to be, in particular, "architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature ...". Unlike other instruments, the Convention includes "works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view". As we have seen earlier, these considerations exclude characteristic elements of the indigenous cultural heritage and do not give aboriginal creators full access to their intellectual property. Furthermore, the interpretation of the concept "outstanding universal value" might exclude from the scope of the Convention other values that are neither universal nor outstanding. In any case, any definition would be incomplete if it did not consider the justified concern of indigenous populations for the preservation and restoration of each culture in all its constantly evolving diversity.

25. In the issue with which we are dealing, the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions, prepared jointly by UNESCO and WIPO in 1985, certainly reflect elements and features of indigenous peoples' cultural identity better than other instruments and should therefore be given special attention by legislators from the countries most involved in the defence of the indigenous heritage. In order to help find an adequate solution in this field, the International Bureau of WIPO prepared draft Model Provisions for National Laws on the Protection of Creations of Folklore, at the national, regional and even international level, on the basis of existing national approaches as reflected in the copyright laws of several countries (UNESCO/WIPO/WG.1/FOLK/2/Add.).

26. The Model Provisions were prepared for the developing countries in order to provide national legislators with a flexible legal framework in which to adopt provisions (in the form of laws, chapters in a code, decrees or decree-laws) that will be better adapted to the specific conditions and historical development of each country.

27. According to section 2 of the Model Provisions, "For the purposes of this [law], 'expressions of folklore' means productions consisting of

characteristic elements of the traditional artistic heritage developed and maintained by a community ... in particular:

(i) verbal expressions, such as folk tales, folk poetry and riddles;

(ii) musical expressions, such as folk songs and instrumental music;

(iii) expressions by action, such as folk dances, plays and artistic forms or rituals; ...

(iv) tangible expressions, such as:

(a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery ... jewellery ... textiles ... costumes;

(b) musical instruments;

(c) architectural forms" (Model Provisions, UNESCO/WIPO, 1985).

28. The Model Provisions appear to focus on the following aspects:

(a) To avoid conflict among the definitions laid down in different countries and bodies of legislation, the Model Provisions provide no definition of the notion of "folklore". In order not to restrict the scope of national legislation, they do not even use the expression "work", which is the category usually adopted for copyright purposes, they do not mention the "cultural heritage of the nation" referred to in the preamble and they do not refer to any particular author. To be sure, it is not sufficient to define the undefinable: what is important is to be able to identify what might identify it;

(b) The Model Provisions are oriented more towards the protection of "expressions" than "creations" of the traditional artistic heritage. In our interpretation, the notion of "creation" has a much broader legal scope in that it covers any artistic creations and cultural values that express characteristic elements of the constantly evolving indigenous heritage. The scope of these provisions not only includes creations inherited from previous generations, in the case at hand those of the pre-Columbian civilizations, but also the whole range of traditional values and expressions of popular art produced by indigenous communities and nations up to the present time.

29. However, the definition of "expressions of folklore" contained in section 2, in accordance with the conclusions of the Committee of Governmental Experts on the Safeguarding of Folklore, which met at Paris in 1982, is still not adequate to cover other forms of cultural heritage. For this reason, during the discussion the International Bureau of WIPO proposed, firstly, that the concept of folklore should be analysed in order to arrive at an acceptable definition of this part of the cultural heritage of nations and, secondly, that an attempt should be made to determine what elements were characteristic of each of the categories of expression that folklore included.

30. Despite achievements and progress in the field of protection of cultural property, the definition arrived at by States did not include religious beliefs, scientific and philosophical intuition (indigenous world view), the contents of ancestral legends and poetry, purely practical traditions, human remains, sacred and mythological places, etc.

31. With certain exceptions that do not undermine the integrity of folklore or hamper its natural development, the Model Provisions (section 3) would make subject to authorization any reproduction, distribution or public performance of the creations of indigenous folklore, if made with gainful intent i.e. for money. They would also prohibit any "imitation" in the form of arrangements of creations of folklore going beyond mere reproduction and interpretation.

32. Without prejudice to the contents of section 3, the model provisions lay down the following exceptions:

(a) Cases where the artistic creations are used for educational purposes, and are simply referred to by way of illustration in the course of teaching;

(b) Utilization by way of illustration in the original work of an author provided that such utilization is compatible with fair practice;

(c) Use of expressions of folklore for the purpose of allowing the free development of the creativity of the author of an original work;

(d) Incidental utilization in connection with reporting on current events.

33. The permanent creation and expression of traditional folklore is closely linked with the performance, reproduction and stylistically varying representation of traditional creations in the originating community. In order to eliminate any contradictory interpretations regarding the protection of the artists who perform or recite the expressions of folklore, such as popular song, tales and legends, music performed on various instruments, dances or folklore shows, States should respond to the need for definitions and for provisions protecting them against illicit exploitation.

34. The essential condition for protecting cultural property is the application of coercive measures. In this connection, the Model Provisions (section 6) provide for a fine and/or prison term for persons contravening the [law] who, without authorization, wilfully deceive others in respect of the source or place of origin of the expressions of folklore and intentionally proceed to misrepresent, distort, mutilate or similarly harm one of the most important categories of the cultural heritage of mankind.

IV. RESTITUTION OF CULTURAL PROPERTY

35. The Model Provisions do not make specific reference to the restitution of the cultural property of the indigenous peoples of the world. That is certainly one of their main weaknesses. Sections 7 and 8 of the Model Provisions simply provide for the seizure of objects made in violation of existing legislation. The Provisions also acknowledge that there should be

compensation for any damage caused by the illicit utilization of folklore, including the loss of royalties that might have been allocated to communities of origin to encourage and develop their cultural values.

36. Pursuant to the right to restitution, compensation and rehabilitation, as stipulated in international law, indigenous peoples and nations demand reparation of their cultural heritage, which sustained inestimable losses as a result of the colonial invasion and occupation, genocide, slavery, systematic discrimination, the mutilation of entire civilizations and the illicit pillaging of the artistic and spiritual property that was their reason for existence and the driving force behind their resistance.

37. Irony of history! After 500 years of colonization in Latin America, the alphabet of the Quechua language, "Qhipu", designed as a series of multi-coloured knots, is found now to be in the British Museum in London. On the other hand, the crown of Montezuma, the Emperor of the Aztecs, on exhibition in a museum in Vienna, Austria has been claimed by his descendants for some time. To have one's ancestors be the subject of curious museum visitors rather than interred in the territories of their origin is undignified, sacrilegious and denies the present generation vital contact with those preceding (E/CN.4/Sub.2/1991/34).

38. The most recent example concerns the community of Coroma in Potosí, Bolivia. According to research by the Bolivian Institute of Culture, the traffic in cultural property increased from the 1970s on, coinciding with the arrival of the military in power and the beginning of the processing of coca leaves into paste.

39. Under neo-liberal policies of "laisser-faire and laisser-passer", in 1978 foreigners, gold-seekers disguised as tourists and North American traffickers in traditional art and weavings began to arrive in Bolivia, equipped with powerful cameras.

40. As if by chance, one day the traffickers reached the community of Coroma, 4,200 metres above sea level, and just happened to "appear at the All Saints Day festivities, the only time in the year when goods woven from vicuna, alpaca and chinchilla wool are brought out into public view and the authorities dress in the sacred garments of their ancestors to venerate the souls that govern the destiny of their tribes" (Presencia, 19 October 1992).

41. In 1983, "at the end of an expedition organized for that specific purpose, the North American trader and businessman Steve Berger and his associates removed by fraudulent means 200 sacred weavings belonging to 10 tribes of the Coroma community. The authorities in charge of keeping the ceremonial weavings were duped and intimidated into selling them for $50 to $60, whereas they were later sold in United States antiques markets for $14,000 to $18,000 apiece". After lengthy bureaucratic dealings with the authorities of the United States of America, only 498 of the 200 ceremonial weavings were restored to the community of Coroma.

42. Because of its nature and importance, the complex question of restitution, compensation and rehabilitation - specific aspects of reparation - has not received sufficient attention, whereas it ought to be examined by United Nations bodies. In that spirit and in response to the legitimate aspirations of the indigenous peoples throughout the world, the Working Group on Indigenous Populations, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights should urge States to seek appropriate solutions and adopt effective legal instruments to ensure the protection and preservation, ownership and restitution of cultural property, especially the artistic assets of folklore as an inexhaustible source of the creative expression of indigenous nations.